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No. 97-581

In The Supreme Court Of The United States

OCTOBER TERM, 1997

PENNSYLVANIA BOARD OF
PROBATION AND PAROLE,
Petitioner

vs

KEITH M. SCOTT,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a search of a parolee's residence by parole agents must be based on reasonable suspicion to be valid under the Fourth Amendment, where the parolee has consented to searches as a condition of parole?

2. Whether the exclusionary rule should apply to parole revocation proceedings?

LIST OF PARTIES

Petitioner is the Pennsylvania Board of Probation and Parole, an agency of the government of the Commonwealth of Pennsylvania. Respondent is Keith M. Scott.

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OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported at 698 A.2d 32 (1997) and is reprinted in the Appendix to the Petition for Writ of Certiorari (Pet. App.) at 1a. The opinion and order of the Commonwealth Court of Pennsylvania are reported at 668 A.2d 590 (1995), and are reprinted in the Pet. App. at 19a.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Pennsylvania was filed on July 3, 1997, and the petition for writ of certiorari was filed within ninety days thereafter on September 30, 1997. The Court granted certiorari by order of November 26, 1997, and has jurisdiction to review the decision of the state supreme court pursuant to 28 U.S.C. §1257(a). *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975) (judgment is final and reviewable where federal issue is finally decided, with further proceedings in state tribunals to come, but in which later review of federal issue cannot be had).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution of the United States provides that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. Amend. IV.

2. Pennsylvania statutes provide in relevant part as follows:

> The board [of probation and parole] is hereby authorized to release on parole any convict confined in any penal institution of this Commonwealth . . . except convicts condemned to death or serving life imprisonment, whenever in its opinion the best interests of the convict justify or require his being paroled and it does not appear that the interests of the Commonwealth will be injured thereby.

Pa. Stat. Ann. tit. 61, §331.21 (Purdon Supp. 1997).

> Any parolee under the jurisdiction of the Pennsylvania Board of Parole released from any penal institution in the Commonwealth who, during the period of parole, violates the terms and conditions of his parole, . . . may be recommitted after hearing before the board. . . .
>
> Such prisoner shall be subject to reparole by the board whenever in its opinion the best interests of the prisoner justify or require his being reparoled

and it does not appear that the interests of the Commonwealth will be injured thereby.

Pa. Stat. Ann. tit. 61, §331.21(b) (Purdon 1964).

> . . . In granting and revoking paroles, and in discharging from parole, the members of the board acting thereon shall not be required to personally hear or see all the witnesses and evidence submitted to them for their action, but they may act on report submitted to them by their agents and employes [*sic*], together with any pertinent and adequate information furnished to them by fellow members of the board or by others.

Pa. Stat. Ann. tit. 61, §331.22 (Purdon Supp. 1997).

> The board shall have the power, and it shall be its duty, to make general rules for the conduct and supervision of persons heretofore or hereafter placed upon parole. In addition to the power to make general rules and regulations hereby granted, the board may, in particular cases, as it deems necessary to effectuate the purpose of parole, prescribe special regulations for particular parolees.

Pa. Stat. Ann. tit. 61, §331.23 (Purdon 1964).

STATEMENT OF THE CASE

The issues presented are whether the Fourth Amendment requires a search of a parolee's residence by parole agents to be based on reasonable suspicion, where the parolee has consented to searches as a condition of parole, and whether the exclusionary rule should apply to parole revocation proceedings to exclude evidence found to have been obtained in violation of the Fourth Amendment. The case arises from parole revocation proceedings before a state parole board. Petitioner is the Pennsylvania Board of Probation and Parole ("Board"); respondent is Keith Scott, a parolee supervised by the Board.

1. The Board is an agency of the Commonwealth of Pennsylvania authorized to parole certain classes of convicted offenders whenever the best interests of the offender justify or require it and the interests of the Commonwealth are not injured thereby. Pa. Stat. Ann. tit. 61, §331.21 (Purdon Supp. 1997). A parolee who violates the terms and conditions of his parole may be recommitted to prison after a hearing. *Id.* at §331.21(b) (Purdon 1964). On September 1, 1993, Scott was paroled by the Board from a 10-20 year term of imprisonment for conviction of third degree murder. J.A. 2a-3a. As a condition of his parole, Scott signed an agreement expressly consenting to searches of his person, property or residence by Board agents without a warrant. J.A. 4a,7a. In particular, his agreement stated:

> In consideration of being granted the privilege of parole/reparole by the Pennsylvania Board of Probation and Parole, I hereby agree that: . . . I expressly consent to the search of my person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole. Any items, in [*sic*] the possession of

> which constitutes a violation of parole/reparole shall be subject to seizure, and may be used as evidence in the parole revocation process.

J.A. 6a-7a. Other conditions of Scott's parole included his agreement to reside with his mother and not change his residence without parole staff permission, to maintain regular contact with the parole staff, to abstain from the use of alcohol and controlled substances, to refrain from any assaultive behavior, and to refrain from "owning or possessing any firearms or other weapons." J.A. 4a-8a.

On February 4, 1994, the Board issued an order to detain Scott, together with a notice charging him with several violations of the terms and conditions of his parole. J.A. 9a-11a. Among the conditions alleged to have been violated was the prohibition against the ownership or possession of any firearms or other weapons. J.A. 10a. This violation was supported by three counts, one of which charged that on February 4, 1994 several weapons — including three shotguns, a semi-automatic rifle, and a bow and arrows -- were found in Scott's residence by parole agents.[1] J.A. 10a.

A hearing examiner for the Board conducted a hearing on the allegations of parole violations on March 30, 1994. J.A. 18a. At the hearing, Scott argued that the parole agents' search of his residence violated his right to be free from unreasonable searches and seizures because of a lack of consent to search. J.A. 79a,82a. The hearing examiner overruled Scott's objection to introduction

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[1]Besides the charges of violation of the firearms condition, Scott also was charged with violating the prohibition against assaultive behavior and consumption of alcohol. J.A. 10a-11a.

of evidence concerning the search and its results, and allowed a parole agent to testify about the search. J.A. 84a-85a.

The testimony revealed that on February 4, 1994, parole agents decided to search Scott's residence for firearms. J.A. 83a. The agents had received information previously that Scott had used firearms while on parole, J.A. 42a-43a, and they had discussed the possibility of the presence of weapons in Scott's home. J.A. 83a,92a. The agents located Scott at a diner near his residence and, after obtaining a key to his residence from Scott, proceeded to the residence accompanied by a female friend of Scott's, entered the residence in the presence of the friend, and asked the friend to telephone Scott's mother (who owned the residence). J.A. 80a-82a. Until Scott's mother arrived, the parole agents remained in the kitchen of the house. J.A. 81a. When she arrived, the agent in charge explained to Scott's mother that the agents intended to search Scott's room. J.A. 81a. Scott's mother at first hesitated to tell the agent where Scott's room was located but, when informed that the agents intended to find it, she escorted them upstairs and directed them to Scott's bedroom.[2] J.A. 81a.

The parole agents discovered four shotguns and a semi-automatic rifle under a sofa in a room next to Scott's bedroom. J.A. 86a-88a. In a closet in the same room, they also discovered a camouflage-colored bow and three arrows. J.A. 87a.

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[2]The agent advised the hearing examiner that he believed he had the authority to search Scott's bedroom and common living areas in the residence, with or without the mother's approval, based on the parolee's being supervised by the Board and living in a residence that had been "approved" by the Board at the time of his release on parole. J.A. 82a-83a. Scott's mother's residence was Scott's Board-approved residence. J.A. 4a,80a.

Although Scott's mother did not testify at the hearing before the hearing examiner, the parole agent informed the examiner that, when the weapons were discovered, Scott's mother advised the agent that they belonged to her husband, J.A. 88a-89a, and her husband so testified. J.A. 98a-99a.

2. The Board relied in part on the evidence obtained from Scott's residence when it revoked Scott's parole. J.A. 137a-140a. It relied on evidence other than the results of the search with respect to certain violations,[3] but with respect to the violation concerning the shotguns, rifle and bow and arrows, the Board relied upon the testimony of the parole agent who conducted the search. J.A. 137a. The Board returned Scott to prison to serve thirty-six additional months of imprisonment for the parole violations.[4] J.A. 137a. Scott's request for further administrative review of the Board's recommitment decision was denied, J.A. 142a, and he then appealed to the Commonwealth Court of Pennsylvania.[5] J.A. 143a.

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[3]For example, the Board relied upon Scott's admission that he had been target practicing with a firearm, upon testimony from a co-worker that Scott had threatened another co-worker, and upon an affidavit of another person that Scott had consumed alcohol and had used a weapon to target practice. J.A. 137a.

[4]Although not of record, we inform the Court that Scott was refused reparole in April 1997 and his status is scheduled to be reviewed by the Board in March 1998.

[5]The Commonwealth Court is the intermediate appellate court in Pennsylvania vested with jurisdiction to hear appeals from state administrative agencies, including the Board of Probation and Parole. *See* 42 Pa. Cons. Stat. §763.

3. On appeal, Scott raised a number of issues including the argument that the weapons violation was the product of an illegal search. J.A. 147a. While his petition for review did not mention the Fourth Amendment specifically, it raised as issues the absence of a warrant and consent, J.A. 147a, and the Fourth Amendment issues were briefed by the parties. A panel of the Commonwealth Court concluded that, although parole revocations are administrative proceedings and not criminal prosecutions, a parole agent may not conduct a warrantless search of a parolee's residence in the absence of consent of the owner or what it termed a "statutory or regulatory framework that satisfies the reasonableness requirement of the Fourth Amendment." Pet. App. 29a. Declaring that Scott's previously-executed written consent to a search of his residence and to seizure of items found by parole agents did not comport with the Fourth Amendment, the Commonwealth Court panel decided that Scott's Fourth Amendment rights had been violated. Pet. App. 30a-31a. The court went on to hold that the exclusionary rule should apply to parole revocation hearings, Pet. App. 37a, and that it was "necessary" to apply it to the weapons seized from Scott's residence. Pet. App. 37a. As a result, the court decided that the hearing examiner should have excluded evidence concerning the weapons, and it reversed the parole revocation decision and remanded the matter for a new revocation hearing. Pet. App. 37a.

4. The Board then petitioned the Supreme Court of Pennsylvania for allowance of appeal to address the Fourth Amendment issue, and the state supreme court granted the

petition.[6] J.A. 1a. Between the time of the state supreme court's granting of the petition and its decision in the case, the Commonwealth Court issued a decision *en banc* which overruled its panel decision in this case. *See Kyte v. Pennsylvania Board of Probation and Parole*, 680 A.2d 14, 18 n. 8 (Pa. Cmwlth. Ct. 1996) (en banc). The Board brought this intervening decision to the attention of the state supreme court and requested the court to remand the case to the Commonwealth Court. The state supreme court denied the request and proceeded to decide the appeal.

The state supreme court affirmed the panel decision of the Commonwealth Court. Pet. App. 1a. Relying upon suppression decisions in the criminal prosecution context, Pet. App. 7a-10a, the court held that Scott "has a Fourth Amendment right against unreasonable searches and seizures that is unaffected by his signing of the consent to search provision" when he was paroled. Pet. App. 10a. The court went on to hold that Scott's Fourth Amendment right was violated because, in its view, the search of his residence "was conducted without reasonable suspicion." *Id.* Furthermore, the state supreme court concluded that the exclusionary rule should be "extended" to parole revocation proceedings because of its "deterrent effect." Pet. App. 10a, 16a.

While recognizing that a majority of the United States Courts of Appeals has concluded that the exclusionary rule is inapplicable to parole revocation proceedings, *id.* at 12a-13a, and that this Court had yet to address the issue, *id.* at 13a n. 8, the

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[6]Under Pennsylvania law, the state supreme court's decision whether to accept an appeal from an intermediate appellate court, in a matter originally commenced in an administrative agency, is a discretionary decision. *See* 42 Pa. Cons. Stat. §724.

state supreme court nonetheless concluded that "there is a need to apply the exclusionary rule to the [parole] revocation process since otherwise there is nothing to deter a parole agent from conducting an illegal search or engaging in other illegal activity to obtain evidence." Pet. App. 15a. Thus, notwithstanding Scott's written consent to searches by parole agents as a condition of his parole, and notwithstanding the settled differences between a criminal prosecution and an administrative parole revocation, the state supreme court concluded:

> In the Fourth Amendment context, when an officer is aware or has reason to be aware of a suspect's [*sic*] parole or probationary status, he must have reasonable suspicion of a parole violation in order to conduct a search. If a reasonable suspicion does not exist, the exclusionary rule will apply in the parole revocation hearing. This holding modifies our *per se* bar against the application of the exclusionary rule in parole revocation hearings . . . and applies the exclusionary rule in revocation hearings when the officer who engaged in the misconduct is aware of the parolee's status.

Pet. App. 16a-17a (footnotes omitted). The court then held that the exclusionary rule applied to Scott's parole revocation hearing and that the evidence obtained from the search of his residence should be suppressed.[7] Pet. App. 17a.

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[7]The court specifically stated that its decision was "premised solely upon federal constitutional grounds," and it left "for another day" the question of the applicability of Pennsylvania's constitutional counterpart to the Fourth Amendment. Pet. App. 17a n.13.

The Court granted the Board's petition for writ of certiorari on November 26, 1997.

SUMMARY OF ARGUMENT

1. The supervision of parolees by parole authorities falls into that small class of cases, recognized by the Court, in which searches without any individualized suspicion of wrongdoing are nevertheless "reasonable" within the meaning of the Fourth Amendment. The Court has upheld such searches — of closely regulated businesses, for example — where a diminished expectation of privacy, plus an important governmental need met by the search, combine to justify them.

Certainly, parolees have a diminished expectation of privacy. The government routinely subjects convicted criminals, conditionally released on parole, to a variety of restrictions, some of which would not be constitutional if applied to the general public, and violation of which is grounds for immediate recommitment. Parolees may, for example, be forbidden to change their residence without permission, to consume alcoholic beverages or illegal drugs, to possess weapons, or to commit further crimes; they may be required to undergo treatment for drug or alcohol dependence, or to avoid certain persons or locations. Parolees are thus, like probationers, in a supervisory relationship with the government quite unlike that of free citizens.

Nor can the importance of the governmental interest be overstated. As the Court has recognized, such restrictions on parolees serve the dual purpose of protecting the public safety from further harmful behavior, and of furthering the rehabilitation and reintegration of the offender into society. The Court has likewise recognized the overwhelming interest of the government in promptly recommitting parolees who do not comply with the conditions of their parole.

To ensure compliance with these restrictions, government thus requires broad discretion to define the conditions under which the persons and property of parolees may be searched. The government may therefore require that convicted criminals, as a condition of parole, submit to searches without any need for an individualized suspicion of wrongdoing, as long as those searches are related to some legitimate penological objective, such as ensuring that parolees are complying with the conditions of their release.

2. Even if respondent's consent did not authorize the search of his residence and the search did not meet a reasonableness standard, evidence obtained from the search should not be excluded from consideration by parole authorities. The exclusionary rule, adopted to safeguard Fourth Amendment rights in the criminal prosecution context, exacts substantial social costs by impeding the search for truth. The Court has declined to extend application of the rule beyond criminal trials and direct review, and should do likewise in this case. The States have a great interest in receipt of all information bearing upon the question whether the parolee is successfully reintegrating into society; this interest should not be frustrated by the exclusion of relevant information especially in a case where the rationale of deterrence of police behavior is inapplicable.

The Pennsylvania Supreme Court gave undue weight to the importance of the parolee's limited interest and blurred the significant distinctions between a criminal prosecution and a parole revocation. The court thus inappropriately extended application of the exclusionary rule to suppress evidence concerning respondent's compliance with parole conditions. The judgment of the court, therefore, should be reversed.

ARGUMENT

I. ABSENT EVIDENCE THAT THE SEARCH OF SCOTT'S RESIDENCE WAS FOR AN ILLEGITIMATE PURPOSE, HIS CONSENT ENTITLED THE PAROLE AGENTS TO SEARCH HIS HOME WITHOUT A PARTICULAR LEVEL OF SUSPICION.

While the Supreme Court of Pennsylvania acknowledged that respondent Scott had consented to searches by parole agents as a condition of his parole, and purported to examine the consent provision in the context of a balance of the relative interests involved, the court failed to recognize the importance of parole conditions to society's interest in managing criminal offenders. Instead of focusing on the special need of the government to place legitimate parole conditions — like a consent to search provision — on parolees, the state supreme court summarily dismissed the provision and equated the parolee's interest with that of a free citizen. The court thus erred in its analysis of both the importance of legitimate parole conditions in general and the value of a consent to search condition in particular.

1. The Fourth Amendment to the Constitution provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. Amend. IV. The prohibition against unreasonable searches and seizures is applicable to state officers. *Elkins v. United States*, 364 U.S. 206, 213 (1960). Although the Court usually has required that, in order to satisfy the Fourth Amendment, a search of an individual's home should be undertaken only pursuant to a warrant (and thus supported by probable cause), the Court also

has recognized that special needs of the government — beyond the normal need for law enforcement — permit exceptions to the usual requirements of the Fourth Amendment. Indeed, as the Court reiterated just last Term, the "touchstone" of the Fourth Amendment is reasonableness, and reasonableness in turn is "measured in objective terms by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. ____, 117 S.Ct. 417, 421 (1996).

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a. To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. *Chandler v. Miller*, ___ U.S. ___, 117 S.Ct. 1295, 1301 (1997). The Court has recognized, however, that in some cases suspicionless searches are permissible. *Id., citing Vernonia School District v. Acton*, 515 U.S. ___, 115 S.Ct. 2386, 2399 (1995) (random drug tests of student-athletes); *Skinner v. Railway Labor Executives Association*, 489 U.S. 609, 619 (1989) (drug and alcohol tests for railway employees involved in train accidents); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989) (drug tests as condition of promotion in Customs Service); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 447 (1990) (sobriety checkpoints along highways). The exceptions are based on "special needs, beyond the normal need for law enforcement." *Skinner*, 489 U.S. at 619. In addition, the Court has held that in certain situations probable cause is not necessary to effect a search. The Court has held, for example, that government employers and supervisors may conduct warrantless searches of employees' desks and offices without probable cause. *O'Connor v. Ortega*, 480 U.S. 709, 721-25 (1987). Similarly, the Court has held that government investigators conducting searches of closely-regulated businesses need not adhere to the warrant or probable cause requirements as long as the searches meet reasonable legislative or administrative standards. *New York v. Burger*, 482 U.S. 691, 702 (1987)

(automobile dismantling business). *Accord Donovan v. Dewey*, 452 U.S. 594, 600 (1981) (coal mining); *United States v. Biswell*, 406 U.S. 311, 316 (1972) (firearms sales); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (catering business engaged in liquor sales). In addition, the Court has held that the search of a high school student's purse by school officials does not require a warrant or probable cause, *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41 (1985), as well as that, because of the extraordinary needs of those charged with administering prisons, the Fourth Amendment is inapplicable to the search of a prison inmate's cell. *Hudson v. Palmer*, 468 U.S. 517, 526 (1984). The Court also has held that law enforcement officials may stop individuals for questioning or observation at fixed border checkpoints without a particular level of suspicion. *United States v. Martinez-Fuerte*, 428 U.S. 543, 545-50 (1976). Finally, and closely analogous to this case, the Court has held that the search of a probationer's home by state probation officers, pursuant to a regulation requiring "reasonable grounds," does not require a warrant supported by probable cause. *Griffin v. Wisconsin*, 483 U.S. 868, 876-77 (1987).

Thus, the Court clearly has recognized situations where the usual requirements of the Fourth Amendment simply do not apply or the particular circumstances and needs permit "exceptions" to the general rule. *Griffin*, 483 U.S. at 873. When such special needs exist, the Court has undertaken a "context-specific" inquiry, examining the competing interests at stake. *National Treasury Employees Union v. Von Raab*, 489 U.S. at 665-66; *Skinner*, 489 U.S. at 624.

b. In *Griffin v. Wisconsin*, the Court premised its conclusion that a state's operation of a probation system presents special needs, justifying departures from the usual requirements, on the fact that probation — like incarceration — is a "form of

criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty;" it represents one of several options on a "continuum of possible punishments ranging from solitary confinement in a maximum security facility to a few hours of mandatory community service." 483 U.S. at 874 (citations omitted).

The operation of a system of supervised release on parole — just as a probation system — presents special needs justifying departure from the usual Fourth Amendment requirements. As the Court has recognized, the "essence" of parole is release from prison, before completion of the sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). Parole has become an "integral part" of the nation's overall system of managing offenders. *Ibid.* The Court has described parole as follows:

> Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison.

Ibid. In recognition of the conditional liberty restored to an offender by parole, the Court has held that revocation of parole deprives him not of an "absolute" interest but of an interest "properly dependent on observance of special parole restrictions," *id.* at 480, and that revocation needs to be accompanied by only informal procedural protections. *Id.* at

487-88.

Furthermore, as the Court recognized in *Morrissey*, to accomplish the purpose of parole, those who are granted permission to leave prison early properly may be subjected to very specific conditions. These conditions "restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen," *id.* at 478, and can include such restrictions as the need to seek permission to change residences, a prohibition against consumption of alcohol, and the direction to refrain from association with certain individuals or engaging in certain activities. *Ibid.*

Supervision of parolees, therefore, plainly is a "special need" of the States "permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." *Griffin v. Wisconsin*, 483 U.S. at 875. While restrictions upon a free citizen's right to travel or to associate with others of his choosing certainly could present significant constitutional concerns, the Court has recognized that the diminished expectation of privacy of probationers and parolees, together with society's need to supervise them closely, permits these restrictions. The Court has stated:

> To a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy "the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special . . . restrictions."

Griffin, 483 U.S. at 874, quoting *Morrissey*, 408 U.S. at 480.

As such, parolees are subject to conditions governing

their activities that could not be imposed upon the general public but which, because of the special importance of monitoring their behavior, are appropriate and thus constitutional. *Griffin*, 483 U.S. at 874-75.

2. Among the several conditions of parole to which Scott agreed in this case was an express consent to searches of his person, property and residence by agents of the Board without a warrant. J.A. 6a-7a. Scott further consented to the seizure and use as evidence of any items the possession of which constituted a violation of his parole. *Id.* The particular parole condition found by the Board to have been violated by Scott when the weapons were discovered by the agents was the condition directing him to refrain from "owning or possessing any firearms or other weapons. . . ." J.A. 5a, 137a.

In exchange for his early release from prison, therefore, Scott agreed to certain conditions a violation of which would permit the Board to revoke his parole and recommit him to prison. *See* Pa. Stat. Ann. tit. 61, §331.21(b) (Purdon 1964). There is, of course, no requirement that a parolee accept the parole conditions; he is free to reject the conditions and serve out his sentence in prison. Scott in this case not only agreed to certain parole conditions governing his behavior and activities while on parole, J.A.4a-8a, but he also expressly consented to warrantless searches by parole agents. *Id.* at 7a.

These types of conditions are no different than conditions requiring substance abuse treatment, mental health treatment or other rehabilitative programming, all of which demonstrate diminished privacy expectations by a parolee over his conduct and his person. *Morrissey v. Brewer*, 408 U.S. at 478-79. As the Court noted in *Morrissey*, ". . . conditions of parole serve a dual purpose; they prohibit, either absolutely or conditionally,

behavior that is deemed dangerous to the restoration of the individual into normal society. And through the requirement of reporting to the parole officer and seeking guidance and permission before doing many things, the officer is provided with information about the parolee and an opportunity to advise him." *Id.* at 478. As further explained by a leading commentator:

> The probation or parole officer has the primary responsibility for supervision of a parolee's or probationer's rehabilitative process. This caseworker, charged with monitoring the offender's performance, owes a responsibility to the public to ensure that probationers and parolees who pose a threat to public safety are not permitted to remain free absent compliance with conditions which obviate possible danger.

J. Gobert & N. Cohen, *The Law of Probation and Parole*, §8.02 (1983) (footnotes omitted).

It is thus apparent that the parole agent performs an extremely important function in a State's overall penological system: he or she not only must monitor the parolee's activities so as to assist the parolee's reintegration into society, but also must protect the public by taking action, where appropriate, to remove the parolee from society if the parole conditions are not met. There can be little doubt that, just like conditions requiring treatment or restricting his association with other offenders, an express agreement by a parolee to permit searches by parole agents is a significant tool to aid the agent in fulfilling the agent's responsibility to the parolee and to society. The parolee's consent allows the agent to make unannounced inspections of the parolee's residence to assure compliance with

parole conditions.

The Court's decisions addressing suspicionless searches in the drug-testing area and in closely-regulated businesses provide an apt analogy to the parole situation. In *New York v. Burger*, 482 U.S. 691 (1987), for example, the Court recognized that, as in other situations of special need, where the individual's privacy interest is weakened and the government's interest in regulation of behavior is heightened, a warrantless surprise inspection is reasonable if it meets certain criteria: a substantial governmental interest; a need for warrantless inspections to further the regulatory purpose; and the absence of unlimited discretion on the part of the inspection officers. 482 U.S. at 702-03. *Accord Vernonia School District v. Acton*, 515 U.S. at ___, 115 S.Ct. at 2395; *Skinner*, 489 U.S. at 627. The Court thus has recognized the value of unannounced suspicionless searches in the context of State regulation of commercial enterprises and other related situations where "an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion ...." *Skinner*, 489 U.S. at 624. In holding that warrantless inspections of junkyards by police officers did not violate the Fourth Amendment, the Court in *Burger* noted, "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential." *Id., quoting United States v. Biswell*, 406 U.S. at 316. Indeed, as the Court stated in *Burger*, surprise is "crucial" if the governmental regulatory scheme is to function. *Ibid.*

If unannounced suspicionless searches are "essential" and "crucial" in the context of commercial regulation, they surely are equally as important — if not more so — in the context of managing a State parole system charged with protecting the public. As the agent who conducted the search in this case testified, the value of the search depends upon the agents' ability

to locate any contraband before the parolee or a person with whom he is living has an opportunity to remove it. J.A. 81a-82a. A consent to search provision — like the unannounced inspection in the commercial regulatory situation and suspicionless drug testing in the railway transportation situation — thus enables the agent to conduct a search that serves as a "credible deterrent." *Burger*, 482 U.S. at 710; *accord Skinner*, 489 U.S. at 628.

3. The state supreme court's decision in this case summarily dismissed the importance of the consent condition and the value of unannounced searches. Pet. App. 9a-10a. Indeed, it converted an express consent into what it termed a simple "acknowledgment that the parole officer has a right to conduct reasonable searches. . . without a warrant." *Id.* Such a characterization not only distorts the plain meaning of the consent provision but, more importantly, fails to afford the deference due those who administer a vital part of the State's penological system. As the Court often has stated in the related context of corrections administration, it should not be for the courts to second-guess the need for a penal regulation or policy as long as it is "reasonably related to legitimate penological interests." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987); *Turner v. Safley*, 482 U.S. 78, 89 (1987). The consent to search provision, agreed to by Scott as a condition of parole, certainly meets this standard.

This is not to suggest, however, that such a consent provision should authorize all searches no matter when or how conducted. Just as prison inmates should be governed by policies and rules that are "reasonably related to legitimate

penological objectives,"[8] so too should parolees be entitled to expect that searches of their residence and person are reasonably related to the legitimate penological objectives of parole supervision. *Accord Griffin v. Wisconsin*, 483 U.S. at 876-77 (reasonable state regulation governing searches of probationers' homes satisfies Fourth Amendment).

The record in this case supports the notion that the search of Scott's residence was reasonably related to legitimate parole objectives. The parole agents had received information that Scott had been using weapons while on parole, and they went to his home with the purpose of attempting to locate firearms; they knew they were looking specifically for such weapons. J.A. 42a,43a,83a. Ownership or possession of firearms by Scott was specifically prohibited by a condition of his parole. J.A.5a. Preventing a parolee from having access to such weapons — particularly a parolee who has been convicted of murder, J.A. 2a — clearly is a legitimate penological objective. An unannounced search for firearms which may be in the possession or control of a parolee already convicted of murder plainly is reasonably related to a legitimate parole objective.[9]

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[8] *O'Lone v. Estate of Shabazz*, 482 U.S. at 349; *Turner v. Safley*, 482 U.S. at 89.

[9] While the record demonstrates that the weapons found in Scott's home actually were owned by his mother's husband, J.A. 99a , this does not detract from the legitimate objective of the search. Regardless whether Scott customarily entered the room where the weapons were found, J.A. 103a, or whether they were "owned" by him, J.A. 99a, the fact remains they were available to him. J.A. 104a-105a. Moreover, even if the evidence supported the proposition that Scott never used the weapons or that he did not enter the room where they were located, it nonetheless was objectively reasonable for the

The value of parole agents' searches of parolees' residences is eliminated if parolees know that the agents must have a particular suspicion of a violation or must obtain a warrant before searching. The Court in *Griffin* acknowledged the value of such a search, even on the basis of an "unauthenticated tip," 483 U.S. at 878, and held that the search of a probationer's residence based on such a tip was reasonable. *Id.* at 879.

> In such circumstances it is both unrealistic and destructive of the whole object of the continuing probation relationship to insist upon the same degree of demonstrable reliability of particular items of supporting data, *and upon the same degree of certainty of violation*, as is required in other contexts. In some cases — especially those involving drugs or illegal weapons — the probation agency must be able to act based upon a lesser degree of certainty than the Fourth Amendment would otherwise require in order to intervene before a probationer does damage to himself or society. The agency, moreover, must be able to proceed on the basis of its entire experience with the probationer, and to assess probabilities in the light of its knowledge of his life, character, and circumstances.

Id. at 879 (emphasis added).

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agents to search for weapons in common areas accessible to a convicted murderer. *Ohio v. Robinette*, 519 U.S. at ___, 117 S.Ct. at 421 (reasonableness is measured in objective terms by examining totality of circumstances).

Absent evidence that the search of Scott's residence was for a purpose unrelated to legitimate parole supervision, his consent to searches — as one of several permissible restrictions upon his behavior — was reasonable and entitled the state parole agents to search his home without a particular level of suspicion.

II. RELIABLE EVIDENCE SHOULD NOT BE EXCLUDED FROM CONSIDERATION BY PAROLE AUTHORITIES, EVEN IF THE EVIDENCE WAS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT.

The Pennsylvania Supreme Court has held that the Fourth Amendment requires application of the exclusionary rule to parole revocation proceedings. There is no need for the Court to address the exclusionary rule issue if, as we have argued in the preceding section, Scott's consent provided a proper basis for the parole agents' search of his residence. Even if Scott's consent did not authorize the search and the search did not meet a reasonableness standard, however, the Court should conclude that reliable evidence concerning a parole violation should not be excluded from consideration by parole authorities. The state supreme court's holding that application of the exclusionary rule is necessary in these circumstances should be reversed.

1. The Fourth Amendment, of course, "contains no provision expressly precluding the use of evidence obtained in violation of its commands. . . . " *United States v. Leon*, 468 U.S. 897, 906 (1984). The exclusionary rule, first applied to the federal government in *Weeks v. United States*, 232 U.S. 383 (1914), and much later to the States in *Mapp v. Ohio*, 367 U.S. 643 (1961), is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its

deterrent effect, rather than a personal constitutional right of the party aggrieved." *Id.*, *citing United States v. Calandra*, 414 U.S. 338, 348 (1974). The Court has stated that whether the exclusionary rule is appropriate in a particular case is a question "separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct,"[10] *Leon*, 468 U.S. at 906, and is to be resolved by "weighing the costs and benefits of preventing the use . . . of inherently trustworthy tangible evidence. . . . " *Id.* at 907.

The cost/benefit analysis has long been a source of concern to the Court. *Leon*, 468 U.S. at 907-08. In *Leon*, for example, the Court held that evidence obtained by police in reasonable reliance upon a defective search warrant should not be excluded from the criminal defendant's trial. 468 U.S. at 922. In so doing, the Court noted its longstanding concern over the "substantial social costs exacted by the exclusionary rule," *id.* at 907, and that an "unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." *Ibid., quoting United States v. Payner*, 447 U.S. 727, 734 (1980).

While proposed extensions of the exclusionary rule to proceedings other than the criminal trial itself have been evaluated under the same cost/benefit approach, *Leon*, 468 U.S. at 909, the Court has restricted application of the rule to criminal trials and direct appeals, and has not extended it to exclude

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[10]We note Scott's argument below, J.A. 79a, 82a, apparently abandoned in this Court, Brief in Opposition to Petition, that the exclusionary rule should be applied to protect his mother's interest. Scott lacks standing to offer such an argument. *United States v. Payner*, 447 U.S. 727, 735 (1980).

evidence from a civil proceeding, federal or state. *Immigration and Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032, 1041-42 (1984). *See also Calandra*, 414 U.S. at 348 (declining to allow grand jury witness to refuse to answer questions based on unlawful search or seizure); *United States v. Janis*, 428 U.S. 433, 454 (1976) (permitting use in federal civil proceedings of evidence illegally seized by state officials). Indeed, even in a situation involving a criminal prosecution, the Court has rejected application of the rule to exclude evidence against a defendant where the evidence was obtained from a third person. *United States v. Payner*, 447 U.S. 727, 735 (1980).

Accordingly, "[a]s with any remedial advice," the application of the exclusionary rule "has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Leon*, 468 U.S. at 908, *quoting Calandra*, 414 U.S. at 348. The Court has acknowledged that "the suppression of probative but tainted evidence exacts a costly toll" upon the truth-finding process in criminal cases, *Payner*, 447 U.S. at 734, and thus has refused to adopt an "unbending application of the exclusionary sanction to enforce ideals of governmental rectitude. . . ." *Ibid.*

2. The analysis of whether the rule should apply in a given situation thus focuses on the purpose underlying the rule, the deterrent effect of its application, and the societal costs of preventing use of the challenged evidence. *Leon*, 468 U.S. at 907-11. A proper application of the balancing approach required by the Court's decisions results in the conclusion that the exclusionary rule should not apply to parole revocation proceedings. As the Court noted in *Lopez-Mendoza*, the framework for determining in what types of proceedings application of the rule is appropriate is a balance of deterrence of unlawful police conduct against the "loss of often probative

evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs." 468 U.S. at 1041. While application of the rule may have some deterrent effect upon parole officers, it undoubtedly would interfere significantly with the State's ability to see that parole conditions are being met. Because evidence of a violation of parole conditions would be excluded by application of the rule, "the state's ability to protect society from additional antisocial acts committed by [parolees], and ultimately its ability to achieve the remedial purposes of the [parole] system, would be impaired." *United States v. Bazzano*, 712 F.2d 826, 834 (3d Cir. 1983) (in banc), *cert. denied sub nom. Mollica v. United States*, 465 U.S. 1078 (1984).

The Court has stated that empirical determinations of the deterrent effect of the exclusionary rule are of little help on the questions presented. *Janis*, 428 U.S. at 449-53. Thus, the Court instead has relied "on its own assumptions of human nature and the interrelationship of the various components of the law enforcement system." *Id.* at 459. In contrast to the police, parole agents under the circumstances of this case are not seeking to convict the parolee of new criminal offenses; therefore, application of the exclusionary rule in this situation would have no deterrent effect whatsoever on police behavior or a criminal prosecution. A parole revocation proceeding in Pennsylvania — as we suspect is the case in most jurisdictions — is not part of a criminal prosecution; and on the record of this case no police officers were involved and no criminal charges were brought against Scott. J.A. 110a, 137a. The Court's repeated concern about extending the exclusionary rule to situations other than criminal trials thus would be eroded by applying it here. In the absence of "convincing indication[s]" that such an extension is warranted, *Lopez-Mendoza*, 468 U.S. at 1046, the Court should adhere to its well-established framework and apply the

exclusionary rule sparingly. *Janis*, 428 U.S. at 454.

Balanced against the marginal deterrence that would be created by application of the rule is the "potential injury" to the purposes of parole revocation proceedings. *Calandra*, 414 U.S. at 349. In this regard, the Court has recognized that the State has a great interest in receiving all information available on the question whether the parolee has observed the conditions of his parole. As the Court stated in *Morrissey v. Brewer*,

> The State has found the parolee guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual's liberty. Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional antisocial acts. Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.

408 U.S. at 483.

The costs to the States from application of the exclusionary rule to revocation proceedings are not limited to the specific *result* of exclusion of evidence in particular revocation hearings. As the Court has recognized, the government has an overwhelming interest in being able to return a parolee to imprisonment without the procedural burdens associated with a new trial if the parolee has failed to abide by the conditions of

parole. *Morrissey*, 408 U.S. at 480. Indeed, the Court repeatedly has stated that the decision to revoke probation or parole is an administrative one and is to be a flexible and informal process that "does not require the full panoply of procedural safeguards associated with a criminal trial." *Black v. Romano*, 471 U.S. 606, 613 (1985). *See also Gagnon v. Scarpelli*, 411 U.S. 778,787-90 (1973); *Morrissey*, 408 U.S. at 489-90. As the transcript of the revocation hearing in this case demonstrates, *e.g.*, J.A. 28a-29a, 60a, 67a, 110a, parolees and their counsel often attempt to equate the hearings with trials. To apply the exclusionary rule to what should be a purely administrative decision converts an informal, information-gathering proceeding into an adversarial trial and changes the role of the parole authorities to one "more akin to that of a judge at trial, and less attuned to the rehabilitative needs of the individual probationer or parolee." *Gagnon*, 411 U.S. at 787-88.

At bottom, the States' ability to protect the public from additional offenses committed by parolees, as well as to assure that parolees are reintegrating appropriately into society, should not be frustrated by the exclusion of relevant evidence. As a majority of the federal Courts of Appeals has recognized, Pet. at 9 n. 5, the exclusionary rule should not apply to parole revocation proceedings.

3. While acknowledging that this Court's decisions require a balancing approach, the Pennsylvania Supreme Court gave undue weight to the deterrent effect on the police in applying the exclusionary rule. Pet. App. 13a. Apparently seeing no distinction between the purposes of a criminal prosecution and the purposes of a parole revocation, *id.*, the state supreme court was persuaded by the reasoning of decisions where police officers conduct searches and the results are sought to be used both in probation revocation proceedings and in new

criminal trials. Pet. App. 13a.

In what only may be described as a myopic view of the situation, the state supreme court concluded that the balance tips in favor of the parolee — and thus in favor of applying the exclusionary rule — when the officer "knows or has reason to know that the suspect [*sic*] is a parolee or probationer." Pet. App. 15a. Such a crabbed view of the situation makes no sense, especially in a case such as this one. The state parole agents who went to Scott's home to conduct the search obviously knew he was a parolee; the very purpose for their detaining Scott and going to his home was to search for weapons, the possession of which was a violation of his parole conditions. J.A. 5a,83a. The application of the rule hardly should turn on whether parole agents "know" the person is a parolee. Indeed, in situations like the present case the agents *always* know the person is a parolee; otherwise, the agents would not be interested in his activities or what he may have in his residence.[11] The agents thus would be required always to have particularized suspicion or the results of

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[11]While not expressly so stating, the state supreme court apparently believed that police officers were involved — or that the parole agents were serving as "stalking horses" for the police — and that a criminal prosecution was brought against Scott along with a parole revocation proceeding. While some courts have expressed concern when the searching agents are police officers, rather than exclusively agents of an administrative board, *see United States v. Harper*, 928 F.2d 894, 897 (9th Cir. 1991), the Court has rejected the argument in the regulatory inspection context. *New York v. Burger*, 482 U.S. at 717 (so long as regulatory scheme is properly administrative, it is not rendered illegal by the fact that inspecting officer has power to arrest individuals for violations other than those created by scheme itself). In any event, no police officers were involved in this case and no criminal prosecution was brought against Scott.

the search would be excluded. As we have discussed above, this view fails to accord the proper weight to the States' interests in revocation proceedings and disregards the distinction between a criminal prosecution and a parole revocation.

The state supreme court's view thus is more medicine than is necessary. *Janis*, 428 U.S. at 454 n. 29. The existence of the exclusionary rule in criminal prosecutions protects parolees against new prosecutions based on unconstitutional searches; there is no need to blur the recognized distinctions between prosecutions and parole revocations especially where, as in this case, there was no attempt to prosecute the parolee criminally.

The decision of the Supreme Court of Pennsylvania that the exclusionary rule is applicable to parole revocation proceedings should be reversed.

CONCLUSION

For these reasons, the Court should reverse the judgment of the Supreme Court of Pennsylvania.

Respectfully submitted,

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